UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Progress, LLC	)	**Docket No. EL21- -000**

COMPLAINT AND REQUEST FOR ESTABLISHMENT OF REFUND EFFECTIVE DATE OF NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION

Pursuant to Sections 206 and 306 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824e and 825e, and Rule 206 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.206 (2020), North Carolina Electric Membership Corporation ("NCEMC" or "Complainant") hereby files this Complaint against Duke Energy Progress, LLC ("DEP" or "Respondent").

NCEMC purchases energy and capacity from DEP pursuant to the Power Supply and Coordination Agreement ("PSCA") originally entered into on December 19, 2008. The PSCA has been amended on several occasions, but the rate set under the PSCA has always incorporated a Return on Equity ("ROE") of 11.0%. As described more fully below, that 11.0% ROE has become excessive and should be reduced as of the date of the filing of this complaint. Therefore, NCEMC requests that the Commission (i) find that the 11.0% ROE is no longer just and reasonable and (ii) set the ROE incorporated in the PSCA no higher than the 7.78% just and reasonable ROE proposed by NCEMC. Further, Complainant requests that the Commission set this Complaint for hearing and order refunds (with interest at Commission-approved rates) for the difference in revenue requirements between the ROE approved in a final order on this complaint and the current 11.0% ROE. Further, Complainant requests that the Commission establish the filing date of this Complaint as the refund effective date for the relief to be afforded in this proceeding.

I. COMMUNICATIONS

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II. THE PARTIES

A. North Carolina Electric Membership Corporation

Complainant North Carolina Electric Membership Corporation ("NCEMC") is a generation and transmission cooperative responsible for the full or partial power supply requirements of its 25 members throughout the state of North Carolina. Those 25 distribution cooperatives, in turn, supply electricity to more than 1 million homes, farms, and businesses in which more than 2.5 million North Carolinians live and work. NCEMC's distribution cooperative loads are located throughout the service areas of three investor-owned public utilities: Duke Energy Carolinas, LLC ("DEC") and DEP, both subsidiaries of Duke Energy Corporation ("Duke"), and Virginia Electric and Power Company, doing business as Dominion Energy Virginia in Virginia and as Dominion Energy North Carolina in North Carolina. NCEMC purchases wholesale power a from DEP under the PSCA, designated as DEP Rate Schedule FERC No. 182, and purchases transmission service under the Network Integration

Transmission Service Agreement, designated as DEP Joint OATT Service Agreement No. 134, to serve the loads of a number of its member cooperatives.

B. Respondent

Respondent DEP, a wholly owned operating subsidiary of Duke Energy Corporation, is a regulated public utility primarily engaged in the generation, transmission, distribution and sale of electricity in portions of North Carolina and South Carolina, and is headquartered in Raleigh, North Carolina. DEP's wholesale sales of transmission service and power supply service are subject to regulation by FERC under the Federal Power Act.

III. BACKGROUND

A. The PSCA

The PSCA was originally filed with the Commission on February 23, 2009 in Docket No. ER09-740.[1] It was accepted by a letter order issued on April 17, 2009 and is on file with the Commission as DEP Rate Schedule FERC No. 182.[2] The PSCA is a cost-based, long-term power supply agreement under which DEP provides partial capacity and energy requirements service to NCEMC for a twenty-year period extending from January 1, 2013 through December 31, 2032. The PSCA has been amended and refiled several times since its original acceptance by the Commission. The current version is the Seventh Amended and Restated Power Supply and Coordination Agreement, which was filed with the Commission in Docket No. ER20-1717 and became effective on June 1, 2020.[3] The filing of the Seventh Amended and Restated PSCA did

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[1] *Carolina Power & Light Company* Cost-Based Power Supply and Coordination Agreement with North Carolina Electric Membership Corporation, Docket No. ER09-740, eLibrary Accession No. 20090224-0058 (February 23, 2009).

[2] *Carolina Power & Light Company,* Docket No. ER09-740, Letter Order, eLibrary Accession No. 20090417-3050 (April 17, 2009).

[3] *Duke Energy Progress*, Docket No. ER20-1717, Letter Order, eLibrary Accession No. 20200610-3078 (June 10, 2020).

not include an updated ROE analysis, and the letter order accepting it did not address the 11.0% ROE.

B. The ROE in the PSCA

The existing 11.0% ROE is a key component of the formula rate calculation set forth in the PSCA to calculate the "Production Capacity Rate." The stated ROE value is incorporated in PSCA Exhibit I, on page 4 of 21, at line 42 ("Cost of Capital – Common Equity"). The note that accompanies the statement of the value reads: "The Cost of Common Equity is fixed at 11% per the provisions of the contract." The 11.0% ROE was included in the PSCA when it was originally executed by the parties in 2008 and has been included in each subsequent "restatement" of the PSCA. Under Section 16.1 of the PSCA, NCEMC expressly retains the right to seek a change in rates for services provided under the PSCA pursuant to section 206 of the FPA.

IV. COMPLAINT

A. The Commission's ROE Framework

For many years, it was the Commission's consistent policy to rely exclusively on the one-step Discounted Cash Flow ("DCF") method in determining just and reasonable ROEs for public utilities subject to the Commission's rate jurisdiction. Since 2014, however, the Commission's ROE methodology has been in a state of flux. In Opinion No. 531, the Commission replaced the one-step DCF with the two-step DCF model it had previously used in setting ROE for natural gas and oil pipelines.[4] In Opinion No. 531, the Commission also supplemented its use of the DCF method with versions of the Capital Asset Pricing Model ("CAPM"), the Risk Premium method, and the Expected Earnings method, for the limited purpose of informing the Commission's "just

[4] *Martha Coakley v. Bangor Hydro-Elec. Co.*, 147 FERC ¶ 61,234, Opinion No. 531 (2014) ("Opinion No. 531"), *reh'g denied* 150 FERC ¶ 61,165, Opinion No. 531-B (2015) ("Opinion No. 531-B").

and reasonable placement of the ROE within the zone of reasonableness established in the record by the DCF methodology."[5]

Two years later, in Opinion No. 551, the Commission decided that, to determine the just and reasonable placement of the ROE within the zone of reasonableness established by the DCF methodology, it would employ not only the methods used in Opinion No. 531 but also an *ad hoc* survey of state-authorized ROEs for a two-year period beginning eighteen months prior to the start of the study period performed by a witness for the respondents in that case.[6]

The following year, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") vacated and remanded Opinion No. 531.[7] In response, the Commission proposed significant revisions to its ROE methodology. In separate orders calling for briefs in pending complaints against the New England Transmission Owners (the dockets that had led to Opinion No. 531)[8] and against the MISO Transmission Owners (which had led to Opinion No. 551),[9] the Commission proposed to use three ROE models – the DCF, the CAPM, and the Expected Earnings model – to compile a composite zone of reasonableness, and then to rely on that composite zone of reasonableness as an evidentiary tool to identify a range of presumptively just and reasonable ROEs for utilities with a similar risk profile to the targeted utility.[10] If the targeted utility's existing ROE was within the range of presumptively just and reasonable ROEs, it would be rebuttably presumed to still be just and reasonable, and the complaint would be dismissed unless there was evidence to overcome the presumption.[11] If the existing ROE was

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[5] *Id.* at P 146.
[6] *Assoc. of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,234 at P 250, Opinion No. 551 (2016) ("Opinion No. 551").
[7] *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).
[8] *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018).
[9] *Assoc. of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018).
[10] *Id.* at P 17.
[11] *Id.*

outside the range of presumptively just and reasonable ROEs, or the presumption was overcome, then FERC would utilize the Risk Premium method, in addition to the three methods mentioned previously, to set the new just and reasonable ROE.

On November 21, 2019, FERC issued Opinion No. 569, addressing the methodology that had been proposed in the Briefing Orders as it applied to the facts raised in the MISO complaints.[12] In Opinion No. 569, the Commission decided that, in determining whether an existing ROE continued to be just and reasonable, it would rely on only two of the four models proposed in the Briefing Orders – the DCF and the CAPM. Opinion No. 569 also revised the low-end and high-end outlier tests used by the Commission in forming an appropriate proxy group for the target utility.

Additionally, Opinion No. 569 significantly revised the Commission's method for setting a new just and reasonable ROE if the existing ROE is demonstrated to have become unjust and unreasonable. The Commission determined that it would create a range of presumptively just and reasonable ROEs for each public utility (or group of utilities) by dividing the zone of reasonableness into quartiles. For a utility of average risk, the range of presumptively just and reasonable ROEs is the quartile centered on the central tendency of the overall zone of reasonableness.[13] For below-average risk utilities, that range is the quartile of the zone of reasonableness centered on the central tendency of the lower half of the zone of reasonableness.[14] For utilities with above-average risk, the range of presumptively just and

[12] *Assoc. of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,129, Opinion No. 569 (2019) ("Opinion No. 569").
[13] *Id.* at P 57. Where the ROE is being set for a single utility, the central tendency refers to the median value of the zone of reasonableness; where the ROE is being set for a group of utilities, the central tendency refers to the midpoint of the zone.
[14] *Id.*

reasonable ROEs is the quartile of the zone of reasonableness centered on the central tendency of the upper half of the zone of reasonableness.

After considering requests for rehearing of Opinion No. 569, the Commission issued an order which again revised its ROE methodology. In Opinion No. 569-A,[15] the Commission decided that it would use the Risk Premium model, in addition to the DCF and CAPM, to construct the zone of reasonableness.[16] Because the Risk Premium model produces a single point value, rather than a range, the Commission decided to impute a zone of reasonableness from the ROE produced by the Risk Premium model by applying the average of the widths of the zones of reasonableness from the CAPM and DCF models to the ROE produced by the Risk Premium model.[17]

Opinion No. 569-A also made several other changes to the methodology FERC had adopted in Opinion No. 569. First, in calculating the two-step growth rate used in the DCF model, the Commission changed the weighting of the short-term growth rate from 66.7% to 80%, and reduced the weighting of the long-term growth rate from 33.3% to 20%.[18] Next, the Commission decided that it would consider the use of Value Line growth rates as an input to the CAPM model in future cases, although it will continue to use IBES growth rates in the DCF model.[19] Additionally, Opinion No. 569-A further revised the high-end outlier test.[20] And finally, the Commission revised its calculation of the zone of presumptively just and reasonable

[15] *Assoc. of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,154, Opinion No. 569-A (2020) ("Opinion No. 569-A") (appeals pending).
[16] *Id.* at P 104.
[17] *Id.* at P 213.
[18] *Id.* at P 57.
[19] *Id.* at PP 78-79.
[20] *Id.* at P 154.

ROEs to encompass one-third (a "tertile") of the overall zone of reasonableness, rather than a quartile.[21]

Breandan. Mac Mathuna, a financial consultant employed by GDS Associates, Inc., a nationally recognized utility consulting firm, performed an analysis implementing the ROE framework adopted by the Commission in Opinion Nos. 569 and 569-A. However, he also has a number of criticisms and objections to aspects of that framework.[22] He therefore performed a second, alternative analysis, correcting for what he considers questionable aspects of the Commission's framework.[23] Both analyses support the conclusion that the 11.0% ROE embedded in the PSCA is unjust and unreasonable.

B. Application of the Opinion No. 569-A Framework Demonstrates that the Existing 11.0% ROE Is Unjust and Unreasonable.

Accompanying this Complaint are the affidavit and supporting exhibits of Breandan T. Mac Mathuna. Mr. Mac Mathuna holds both a bachelor's degree and a Master of Business Studies degree from University College Dublin, Ireland. He has more than ten years' experience in the electric power industry performing financial and pricing analyses, including analyses in the area of cost of capital. At NCEMC's request, Mr. Mac Mathuna prepared the affidavit and exhibits that are appended as Attachment 2 to this Complaint. Mr. Mac Mathuna's affidavit (Exhibit No. BTM-1) and exhibits (Exhibit Nos. BTM-2 through BTM-12) present both his application of the analytical approach described by the Commission in Opinion Nos. 569 and

[21] *Id.* at P 190. The zone of presumptively just and reasonable ROEs would be the lower third of the zone of reasonableness for a public utility of below-average risk, the middle third for a public utility of average risk, and the top third for a public utility of above-average risk. *Id.* at PP 193-94.
[22] *See* Exhibit No. BTM-1 at 9:1-8, 23:2-11, 24:12-25:5, 28:18-36:6, 42:4-.47:14, and 69:1-73:7.
[23] *See id.* at 9:14-11:5, 23:12-24:2, 25:3-18, 36:8-38:10, and 57:19-62:8.

569-A and his preferred alternate approach. His analysis and findings for the Opinion Nos. 569 and 569-A approach are summarized as follows.[24]

1. Selection of the proxy group

Mr. Mac Mathuna applied the Commission's screening criteria to identify an appropriate proxy group of electric utility companies with risk characteristics similar to those of DEP. Specifically, Mr. Mac Mathuna chose electric utilities that meet the following criteria:

- the use of a national group of companies considered electric utilities by Value Line;
- the inclusion of companies with credit ratings no more than one notch above or below the utility or utilities whose ROE is at issue;[25]
- the inclusion of companies that pay dividends and have neither made nor announced a dividend cut during the six-month study period;
- the inclusion of companies with no merger activity during the six-month study period that is significant enough to distort the study inputs; and
- the inclusion of companies whose ROE results pass threshold tests of economic logic, including both a low-end outlier test and a high-end outlier test.[26]

In applying these criteria, Mr. Mac Mathuna first applied the Commission's credit rating screen, using DEP's credit ratings of A- from S&P and A2 from Moody's. Because there are currently only two other Value Line electric utilities with a Moody's rating within one notch of DEP's A2 rating, Mr. Mac Mathuna expanded the Commission's credit rating screen by the

[24] Mr. Mac Mathuna disagrees with certain aspects of the Opinion Nos. 569 and 569-A methodology which is, in any event, pending on appeal before the D.C. Circuit. Accordingly, in addition to an analysis conforming to Opinion Nos. 569 and 569-A, Mr. Mac Mathuna also performed an alternative analysis presented in section IV.C, *infra*, and in Exhibit Nos. BTM-1,3, and 5-7.

[25] The Commission requires use of both Standard and Poor's ("S&P") corporate credit ratings and Moody's issuer ratings when both are available. *See* Opinion No. 569 at P 365, footnote 748.

[26] Exhibit No. BTM-1 at 15:6-16:4.

minimum modification necessary and lowered the Moody's screen by one additional notch to Baa1.[27] Thirteen Value Line electric utilities satisfied this screen, and none were eliminated by the dividend or merger activity screens.[28] However, Mr. Mac Mathuna did eliminate one member of the proxy group (Avangrid) because its corporate ownership and structure is markedly different in crucial respects from the rest of the electric utilities in the proxy group.[29] The remaining twelve members are identified in Exhibit No. BTM-4.

2. **Composite zone of reasonableness**

To develop the "composite zone of reasonableness," Mr. Mac Mathuna first applied the DCF, CAPM and Risk Premium models, as described in the Opinion Nos. 569 and 569-A, using financial data for the six-month period ending July 31, 2020. His application of the models is detailed in his attached affidavit.[30] As shown on Exhibit Nos. BTM-8 and BTM-10, the DCF model produced a range of reasonableness of 6.76% to 9.75%, and the CAPM produced a range of 8.22% to 10.54%.[31] The Risk Premium model, as noted earlier, produces only a single point result, which was 9.38%.[32] In compliance with Opinion No. 569-A, Mr. Mac Mathuna imputed a range for the Risk Premium model by superimposing the average width of the DCF and CAPM ranges onto the Risk Premium point estimate output.[33] This produced a range of 8.05% to 10.70%.[34]

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[27] *Id.* at 16:10-14.
[28] *Id.* at 17:1-6.
[29] These differences are detailed in Exhibit BTM-1 at 17:9-19:4.
[30] *See* Exhibit BTM-1 at 38:14-40:14 (DCF), 62:1-65:7 (CAPM), and 73:14-76:2 (Risk Premium).
[31] In applying the CAPM model, Mr. Mac Mathuna used the natural break test to exclude OGE Energy as a high-end outlier, because it had an ROE result 150 basis points, or 14.3%, higher than the next highest result. See Exhibit BTM-1 at63:10-65:3.
[32] Exhibit BTM-1 at 76:2 ; *see also* Exhibit BTM-10.
[33] *See* Exhibits BTM-1 at 75:8-16 and BTM-10.
[34] *See* Exhibits BTM-1 at 76:2 and BTM-3.

Mr. Mac Mathuna next averaged the high and low ends of the ranges produced by the DCF and CAPM models and the imputed Risk Premium range. This produced a composite zone of reasonableness of 7.68% to 10.33%.[35] Although there is significant evidence that DEP is a lower-than-average risk utility – for instance, no members of the proxy group have higher ratings from S&P or Moody's[36] – Mr. Mac Mathuna determined that, on balance, DEP should be treated as an average risk utility.[37] He therefore compared the PSCA's 11.0% ROE to the middle tertile of the composite zone of reasonableness, which is 8.84% to 9.43%,[38] and thus concludes that the existing ROE is unjust and unreasonable.

C. Application of Mr. Mac Mathuna's Alternate Framework Also Demonstrates that the Existing 11.0% ROE Is Unjust and Unreasonable.

As demonstrated above, Mr. Mac Mathuna performed an analysis implementing the ROE framework adopted by the Commission in Opinion Nos. 569 and 569-A. However, he has a number of criticisms and objections to aspects of that framework.[39] He therefore performed a second analysis, correcting for what he considers questionable aspects of the Commission's framework.[40] That alternative analysis provides additional support for the conclusion that the existing 11.0% ROE is unjust and unreasonable.

Mr. Mac Mathuna's alternate analysis used the same proxy group described above for the analysis implementing the Opinion Nos. 569 and 569-A framework. However, rather than using three ROE models to test the reasonableness of the existing ROE and to set the parameters of the zone of reasonableness, Mr. Mac Mathuna relied only on the DCF and CAPM approaches.[41]

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[35] Exhibits BTM-1 at 11:12 and BTM-3 at 2:4.
[36] *See* Exhibit BTM-1 at 20:14-16 and note 28.
[37] *Id.* at 20:2-4.
[38] *Id.* at 85:9 and Exhibit BTM-3 at 2:14.
[39] See n. 22, *supra*.
[40] See *id.* at n. 23
[41] Exhibit BTM-1 at 9:14-16.

Reliance on the Risk Premium method is extremely problematic, as Mr. Mac Mathuna demonstrates and as the Commission itself held in Opinion No. 569.[42] First, the method is inherently circular, as it relies on past Commission decisions as a key input.[43] Second, because those past Commission decisions include cases resolved by settlement,[44] where the agreed upon ROE may reflect a trade-off with other issues rather than the parties' judgment as to the best estimate of the cost of capital, and where the settlements themselves routinely state that the resolution of issues therein should not be treated as precedent, the Risk Premium method is unreliable. Third, it is largely redundant with the CAPM.[45] Fourth, the Commission has found that reliance on previous Commission decisions, rather than primary data, makes it less accurate than the DCF or CAPM.[46] Fifth, the Risk Premium method requires numerous judgment calls which render it less transparent and predictable than the DCF or CAPM.[47] Finally, the Commission pointed to the difficulty, verging on impossibility, of ensuring contemporaneity between long-term Treasury bond yields and the cost of equity allowed by a regulator.[48] For all of these reasons, Mr. Mac Mathuna adhered to the reasoning of Opinion No. 569 and omitted the Risk Premium method from his alternative analysis.

1. Alternative Two-Step DCF Analysis

Mr. Mac Mathuna's alternative DCF analysis differed from his analysis following the Opinion Nos. 569 and 569-A framework in two ways. First, he did not adopt Opinion No. 569-A's approach to estimating the dividend growth rate by weighting the short-term growth rate at

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[42] Opinion No. 569 at PP 340-351.
[43] *Id.* at P 343; *Generic Determination of Rate of Return on Common Equity for Public Utilities*, Order No. 489, 53 Fed. Reg. 3342-01 (February 5, 1988), FERC Stats. & Regs ¶ 3356.
[44] Opinion No. 569-A at P 109.
[45] Opinion No. 569 at P 341.
[46] *Id.* at P 342.
[47] *Id.* at PP 346, 349.
[48] *Id.* at P 348.

80% and the long-term growth rate at 20%,[49] using instead the 2:1 weighting the Commission had adopted for electric utilities in Opinion No. 531, and which it continues to use for oil and natural gas pipelines. Mr. Mac Mathuna also did not adopt Opinion No. 569's decision to calculate the adjusted dividend yield using only the short-term growth rate; rather he used the composite dividend growth rate based on a 2:1 weighting of both growth rates, as the Commission had previously done.[50] In the former case, as Mr. Mac Mathuna explains in detail in his affidavit, the Commission's rationale for changing its weighting was inconsistent with its previous rationale for adopting the 2:1 weighting, overly dependent on the current amount of separation between long-term and short-term rates, and inconsistent with the weight of academic literature.[51] He also explains that any observed differences between short term and long term rates were largely irrelevant to the Commission's decision to use a 2:1 weighting approach when it stated its rationale for use of a two-step DCF model, using the two-thirds/one-third weighting balance.[52] In the latter case, Mr. Mac Mathuna found the Commission's position to be inconsistent with the basic DCF formula,[53] explaining that although the DCF formula uses the "g" component twice, it is the same growth rate that is being measured.[54] Thus, there is no rationale for using two different approaches to determining the "g" component.

Mr. Mac Mathuna's application of the alternative DCF analysis is shown in his attached affidavit and exhibits, and derives a range of ROE results from 7% to 9.21%, with a median of 8.26%.[55] This median result is slightly below the 8.45% median value of his strict application of

[49] Exhibit BTM-1 at 31:14-16.
[50] Exhibit BTM-1 at 36:1-6; *see also* Opinion No. 569 at P 98.
[51] Exhibit BTM-1 at 28:18-35:18.
[52] *Id.* at 28:18 – 30:11.
[53] The formula is k = (D/P) (1 + 0.5g) + g. *Id.* at 26:7.
[54]; *Id.* at 36:3-6.
[55] *Id.* at 40:15

the Opinion Nos. 569/569-A DCF model, based on a range of reasonableness of 6.76% to 9.75%.[56]

2. Alternative CAPM Analysis

Mr. Mac Mathuna's alternative CAPM analysis differs in two ways from the CAPM analysis that results from a strict application of the Opinion Nos. 569 and 569-A framework. First, based on his review of studies from the academic and financial communities, Mr. Mac Mathuna did not include a size premium adjustment in his alternative CAPM analysis.[57] He explains that recent studies demonstrate that there is no basis for adding a size premium adjustment factor after adjusting for market risk, and that many of the anomalous risk premia have been declining over time.[58] Second, where the Commission relied solely on an *ex ante* approach to estimating the market risk premium, Mr. Mac Mathuna performed analyses using both *ex ante* and *ex post* estimates, and averaged the two.[59] He explains that the Commission has used an *ex post* analysis in determining the appropriate equity return for generators in PJM's markets, and that many other federal agencies rely on *ex post* measures of the market risk premium.[60] Mr. Mac Mathuna also modified the *ex ante* measure of the market risk premium from that approved in Opinion Nos. 569 and 569-A by including a long-term growth rate in the calculation.[61] His application of the alternative CAPM analysis, and his detailed explanations of why his alternative method is superior to the Opinion Nos. 569 and 569-A CAPM framework, are shown in his attached affidavit and exhibits.[62]

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[56] *Id.*
[57] *Id.* at 10:17.
[58] *Id.* at 43:4-47:5.
[59] *Id.* at 51:6-10.
[60] *Id.* at 49:5-50:11.
[61] *Id.* at 56:5-12.
[62] *Id.* at 42:4- 60:3.

3. Alternative analysis composite zone of reasonableness

In determining the composite zone of reasonableness produced by his alternative method, Mr. Mac Mathuna revised the method utilized by Opinion Nos. 569 and 569-A in one regard. Rather than averaging the range of results produced by each model, Mr. Mac Mathuna blended the results produced by each model to create a composite ROE for each proxy group member.[63] Mr. Mac Mathuna explained that this adjustment was necessary to avoid the anomalous situation where a single proxy group company could set, in part, both the top and bottom of the composite range of reasonableness.[64]

As shown on Exhibits BTM-3, BTM-6, and BTM-7, the alternative DCF model produced a range of reasonableness of 7.00% to 9.21%, the alternative CAPM using an *ex-ante* market risk premium estimate produced a range of 7.46% to 9.85%, and the alternative CAPM using an *ex-post* market risk premium estimate produced a range of 6.07% to 6.99%. Blending the ROEs produced for each proxy group member by the DCF and CAPM analyses produced a range of 7.41% to 8.34%, with a median of 7.78%.[65] Clearly, the existing 11.00% ROE, which exceeds the median of the range or reasonableness by 322 basis points, and the top of that range by 266 basis points, is unjust and unreasonable.

D. The Conclusion that the PSCA's 11.0% ROE Is Unjust and Unreasonable Is Reinforced by Consideration of Changes in Financial Market Conditions.

In addition to the analyses described above, Mr. Mac Mathuna also reviewed changes in financial market conditions since the 11.0% ROE was accepted by the Commission to determine whether changes in market conditions would support the conclusion that an ROE that was just and reasonable at that time might no longer be just and reasonable. Mr. Mac Mathuna observed

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[63] *Id.* at 81:12-15.
[64] *Id.* at 79:7-12
[65] *Id.* at81:12-82:4; *see also* Exhibit BTM-3 at 1:14-16.

that, during the six month study period ending July 31, 2020, the Dow Jones Industrial Average ("DJIA") was more than 2.5 times as high as its average value during the six months preceding the filing of the settlement agreement in Docket No. ER09-740, notwithstanding the fact that the DJIA experienced a significant drop as a result of the Covid-19 pandemic before recovering much of its lost value.[66] He also observed that yields on 10- and 30-year Treasury Bonds, and on Moody's Baa and A-rated public utility bonds, have all declined significantly over the same time period.[67] Finally, Mr. Mac Mathuna took note of the fact that the principal rating agencies consider DEP to be less risky now than when the existing ROE was established.[68] All of these observations reinforce the conclusion that the 11.0% ROE is no longer just and reasonable.

E. The Current Formula Rate Based on an 11% ROE Results in Excessive, Unjust and Unreasonable Rates for NCEMC.

Although the Commission has authorized the use of market-based rates for power supply transactions in workably competitive markets, it has found that DEP retains market power for power sales within its service territory, and thus has required that DEP charge its wholesale power supply customers located in its service territory, such as NCEMC, rates based on the cost of providing service.[69] Allowing DEP to continue to charge NCEMC rates for wholesale power supply service based on an excessive return on equity would result in NCEMC paying rates well above DEP's actual cost to provide that service. The formula rate in the PSCA allows DEP to

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[66] Exhibit BTM-1 at 88:18 -89:9.
[67] *Id.* at 89:16-90:3 and Table 7.
[68] *Id.* at 91:11-17.
[69] *See Duke Energy Corp., et al.*. 139 FERC ¶ 61,194 (2012) (authorizing the merger of Duke Energy Corporation and Progress Energy Inc. conditioned on retention of the cost-based rate restriction on sales of power supplies in DEP's, Duke Energy Carolinas' ("DEC") and Duke Energy Florida's balancing authority areas. The Commission imposed that restriction in order to mitigate market power held by those entities with respect to sales into the DEC, Progress Energy Carolinas East and Progress Energy Carolinas West balancing authority areas, and in Peninsular Florida. *CinCap V LLC, et al.*, Triennial Market-Based Rate Update Filing, Transmittal Letter at 2, Docket No. ER17-1964-000 (June 30, 2017). DEP's Market-Based Rate Tariff states that DEP does not have authority to make sales under this Tariff within the DEC BAA, the DEP BAAs or in Peninsular Florida, "without first receiving Commission approval of the transaction under Section 205 of the Federal Power Act." DEP Market-Based Rate Tariff, Section I.

annually adjust rates charged to NCEMC for all but a few of the expenses that comprise the cost of providing that service.[70] It also includes a true-up that ensures DEP does not under-recover those expenses, all of which can change annually.[71] Only the return on equity and depreciation expense components are treated as stated values,[72] and DEP initiates a review of and changes to its depreciation rates every five years Thus, DEP would over-collect its cost of service unless the excessive 11% return on equity is lowered. Because the formula allows DEP to adjust rates annually to recover actual costs for almost all other expenses, the over-collection of costs resulting from the excessive return on equity stated in the PSCA would not be offset by under-collections of other expenses under the formula. Consistent with its obligations under FPA section 205, the Commission should remedy this injustice and direct DEP to lower the rate of return stated in the PSCA and provide refunds as requested.

F. Additional Information Required by Rule 206.

In compliance with Rule 206, NCEMC submits the following information:

1. Basis for Complaint (18 C.F.R. §§ 385.206(b)(1) and (2))

The basis for the Complaint is that the 11.0% ROE currently applied in the calculation of charges to NCEMC under the PSCA is excessive, unjust and unreasonable in violation of FPA sections 206 and 306.

[70] PSCA Articles 4.0 and 5.0.
[71] PSCA at sections 4.1.5.5, 5.2, and 5.3.
[72] PSCA at Exhibit 1, page 4, note 1 and page 5, note L. In additions to the stated values for ROE and depreciation expense, the contract provides for timely recovery of additional costs that pose a significant financial risk to DEP, including construction work in progress for plant additions, regulatory assets associated with early-retirement of coal plants, and coal ash remediation costs. See, e.g., PSCA section 4.2 (coal ash costs), Exhibit I, p. 2, l. 2 (CWIP), and Exhibit I, note M (regulatory assets for recovery of early-retired coal plants).

2. Business, Commercial, Economic or Other Issues Presented (18 C.F.R. § 385.206(b)(3))

The business, commercial or economic issues presented by this Complaint are: (i) is the existing 11.0% ROE stated in the PSCAA unjust and unreasonable under FPA sections 206 and 306, and, if so, (ii) what is the just and reasonable replacement ROE to be included in the PSCA?

3. Good Faith Estimate of Financial Impact or Burden (18 C.F.R. § 385.206(b)(4))

Based on data currently available to NCEMC for the calendar year 2019, NCEMC estimates that a 100 basis point reduction in the stated ROE included in the PSCA would reduce DEP's charges to NCEMC by approximately $6-9 million per year. Thus, a reduction to the 7.78% ROE proposed in the complaint would reduce charges to NCEMC by approximately $20-30 million annually.[73]

4. Practical, Operational, or Other Nonfinancial Impacts Imposed (18 C.F.R. § 385.206(b)(5))

There are no practical, operational or other nonfinancial impacts of the matter that is the subject of this Complaint.

5. Whether the Issues Presented Are Pending in Other Proceedings (18 C.F.R. § 385.206(b)(6))

The issues presented by this filing are not pending in an existing Commission proceeding or in a proceeding in any other forum in which NCEMC is a party.

6. Specific Relief or Remedy Requested (18 C.F.R. § 385.206(b)(7))

NCEMC seeks a ruling by the Commission that (i) finds that the 11.0% ROE stated in the PSCA formula rate is unjust and unreasonable, (ii) establishes a just and reasonable replacement

[73] The financial impact is presented as a range because NCEMC's purchases under the PSCA are scheduled to increase between 2020 and 2023.

ROE of 7.78% or such other rate as may be based on the evidence presented at hearings, and (iii) directs DEP to provide credits or pay refunds, including interest calculated in accordance with 18 C.F.R. § 35.19a, of the difference between charges calculated and assessed using the existing 11.0% ROE and charges calculated using the replacement ROE, for the period that begins with the date of this Complaint as the start of the refund effective period.

7. Documents that Support the Facts in the Complaint (18 C.F.R. § 385.206(b)(8))

The facts set forth in the Complaint are supported by Attachments 1 and 2 to the Complaint.

8. Whether Alternative Dispute Resolution Processes Were Used and Whether Those Processes Might Resolve the Dispute (18 C.F.R. § 385.206(b)(9)(i) and (ii))

NCEMC has not made use of the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures. Based on informal discussions with DEP, NCEMC does not believe the use of such processes would lead to resolution of the dispute.

9. Form of Notice (18 C.F.R. § 385.206(b)(10))

A form of notice of the filing of this Complaint, suitable for publication in the Federal Register, is provided as Attachment 3.

10. Service (18 C.F.R. § 385.206(c))

A copy of this filing is being served on this date on the following representatives of Duke Energy Progress, LLC designated as corporate officials for that company at https://www.ferc.gov/electric-matters-d

Molly Suda
Associate General Counsel
Duke Energy Corporation
325 7th Street NW, Suite 300
Washington, DC 20004
Telephone: 202-824-8011
Email: molly.suda@duke-energy.com

Heather Horne
Associate General Counsel
Duke Energy Corporation
1301 Pennsylvania Ave., NW
Suite 200
Washington, DC 2004
Telephone: 202-824-8009
Email: heather.horne@duke-energy.com

In addition, a copy of this Complaint is being served on this date on the following "affected regulatory agencies" pursuant to Commission Rule 206(c):

North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300
ATTN: Mr. Sam Watson, Gen. Counsel

Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, SC 29210
ATTN: Jocelyn Boyd, Chief Clerk

NCEMC is not aware of other entities that it "reasonably knows may be expected to be affected by the complaint" on whom service would be required under Rule 206(c).

G. Request for Establishment of Refund Effective Date and Statement Regarding "Fast Track Processing."

NCEMC hereby requests the establishment of a refund effective date pursuant to Federal Power Act section 206(b), which states, in relevant part:

> Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding

> instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint.

NCEMC further requests that the Commission establish the date of filing of the instant Complaint as the refund effective date under FPA section 206(b). This would be consistent with the Commission's long-standing policy of providing maximum refund protection to customers.[74]

NCEMC is not requesting"Fast Track processing" of this Complaint under Commission Rule 206(h).

[74] *See, e.g., East Tex. Elec. Coop. v. Pub. Serv. Co. of Okla.*, 166 FERC ¶ 61,020, P 42 (2019), *citing Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993) and *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

V. CONCLUSION

Wherefore, for the foregoing reasons, NCEMC respectfully requests that the Commission: (1) find that the 11.0% ROE contained in the PSCA is unjust and unreasonable and should be reduced to the just and reasonable 7.78% level determined by NCEMC's testimony, effective as of the date of this Complaint; (2) establish the date of the filing of the Complaint as the refund effective date for this Complaint; (3) order refunds (with interest at Commission-approved rates) for amounts reflecting the difference in charges under the PSCA based on applying the ROE that is established in this proceedings rather than the current 11.0% ROE, commencing with the refund effective date established for this Complaint; and (4) grant such other and further relief as the Commission may deem appropriate.

Respectfully submitted,

/s/ Barry Cohen

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